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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

EDWARD B. CROUSE,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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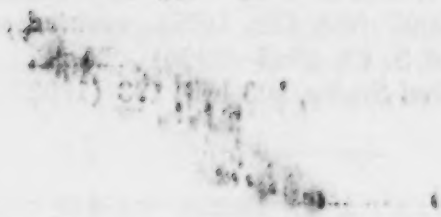

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

In *Koon* v. *United States*, 116 S. Ct. 2035 (1996), this Court held that a district court's decision to depart from the Sentencing Guidelines based upon the presence of a discouraged factor in an unusual or exceptional degree is reviewable under the deferential abuse-of-discretion standard. *Id.* at 2047. As the government concedes, the Court of Appeals in this case "considered the district court's departure decision under the *wrong* standard of review" in light of *Koon*. Opp. 7 (emphasis added). That error caused the Court of Appeals to set aside the district court's finding that petitioner's exceptional record of charitable and community service warranted a departure. Consistent with this Court's established "GVR" practice, and its recent order in *United States* v. *Rybicki*, 116 S. Ct. 2543 (1996), the Court should grant the petition,

vacate the judgment below, and remand for further consideration in light of *Koon*.

ARGUMENT

1. As the Court reiterated this past Term, "the GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices." *Lawrence* v. *Chater*, 116 S. Ct. 604, 606 (1996) (per curiam). Perhaps the most common set of circumstances in which this Court has exercised its GVR authority is when (1) there is an intervening decision of this Court that the Court has "reason to believe the court below did not fully consider"; (2) there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration"; (3) "it appears that such a redetermination may determine the ultimate outcome of the litigation"; and (4) the "equities" favor reconsideration. *Id.* at 607. As explained next, each of these considerations cuts in favor of exercising the Court's GVR authority here.

2a. *First*, it is indisputable that the Sixth Circuit below did not have the benefit of this Court's decision in *Koon* when it reviewed petitioner's sentence in both of the prior appeals in this case, because *Koon* was not decided until June 13, 1996, the day on which the petition for certiorari was filed in this case.

b. *Second*, it is clear that the decision below rests upon a premise that the Sixth Circuit would reject if given the opportunity to do so. As explained in the petition, in reviewing petitioner's sentence, the Sixth Circuit, consistent with its own prior precedent, considered de novo the question whether the record supported the district court's decision to depart downwards on the basis of petitioner's exceptional record of charitable and community service. Pet. 8, 10.[1] As the government concedes, under

[1] As noted in the petition, petitioner objected below to the application of de novo review. Pet. 10 n.12.

this Court's intervening *Koon* decision, that was the "wrong standard of review." Opp. 7.

In *Koon* this Court recognized that "[a] district court's decision to depart from the Guidelines * * * will in most cases be due *substantial* deference, for it embodies the traditional exercise of discretion by a sentencing court." 116 S. Ct. at 2046 (emphasis added). This follows both from the nature of the departure determination and from the district court's superior vantage point to make it. As the *Koon* Court observed:

> Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do. [*Id.* at 2046-47.]

In this case and others, the Sixth Circuit had, prior to *Koon*, discounted the district court's special competence to make these determinations, and reviewed de novo the question whether a discouraged factor was present in such a degree as to take a case outside of the heartland and warrant a departure. *See* App. 29a. In the wake of *Koon*, however, the Sixth Circuit itself has recognized that district court departure determinations are reviewable only for abuse of discretion, and not de novo. *See United States* v. *Barajas-Nunez*, —— F.3d ——, 1996 WL 438661, at *3-*4 (6th Cir. Aug. 6, 1996). In other

words, following *Koon*, the Sixth Circuit has disavowed the premise upon which petitioner's sentence was reviewed.

c. *Third*, it is evident that, at a bare minimum, permitting the Sixth Circuit to reconsider its prior decisions in this case under *Koon*'s deferential abuse-of-discretion standard *might* determine the "ultimate outcome" of this litigation, which is all that is required to warrant a GVR order in the proper circumstances. *Chater*, 116 S. Ct. at 607. Indeed, contrary to the suggestion of the government, the district court's departure decision in this case is tailor-made for *Koon* deference.

At sentencing, the district judge reviewed a substantial amount of information and heard testimony regarding petitioner's 30-year record of charitable and civic contributions to the community in which he lived and with which the judge was "intimately" familiar. App. 39a. The district judge concluded that this record was "extraordinary" and "extremely unusual" in nature. App. 40a. Indeed, he found that petitioner "ha[d] made a greater singular contribution to a middle-sized community than anyone else * * * ever appear[ing] before th[e] Court." App. 42a. Thus, while recognizing that "[d]ownward departures are to be very sparingly used by the Court as a sentencing methodology," the judge ultimately determined that the unique circumstances of petitioner's case warranted such a departure. App. 38a. *See* Pet. 6-7.

In its brief in opposition, the government argues that, notwithstanding the district court's detailed findings regarding petitioner's community service record, the Sixth Circuit would reach the same conclusion under *Koon*'s abuse-of-discretion standard as it did in applying de novo review. Opp. 7. That argument fails for several reasons. First, the record refutes the government's suggestion (*id.*) that petitioner's charitable and community service record is not exceptional when compared to that of other corporate executives. As noted in the petition, the record establishes that "[petitioner]'s volunteer efforts began at

a relatively young age"—before he became a corporate executive. App. 4a. Moreover, on remand from the first appeal, petitioner put on additional evidence establishing that his record was extraordinary when compared to similarly situated white-collar defendants in particular. *See* Pet. 20 n.17.

Second, the government erroneously suggests that the district court improperly based its departure decision on petitioner's businesses losses and his culpability in relation to his co-defendants. Opp. 8-9. It is quite clear that the district court grounded its decision to depart in its findings regarding petitioner's extraordinary charitable and community service record. App. 40a-43a. As explained in the petition, and as the government does not dispute, that is a valid basis for a departure on a proper record. Pet. 8 n.7. Thus, even if the district court had improperly placed any reliance on the factors cited by the government, a remand would still be warranted. *See Williams* v. *United States*, 503 U.S. 193, 203 (1992) (when an appellate court determines that a departure is based in part on improper grounds, it must remand unless it concludes that the sentencing court would have imposed the same sentence using only proper grounds).

In any event, this Court rejected a similar argument in *Koon*. There, the government argued that certain departure factors such as a defendant's loss of career should always be deemed impermissible departure factors. 116 S. Ct. at 2050-51. The Court reasoned, however, that this was a policy argument better directed to the Sentencing Commission. Furthermore, the Court held that the Guidelines do not limit the number of factors that might support a departure, and that unusual circumstances might justify a departure if they exist in an extraordinary degree in any particular case. *Id.* at 2050. Of course, under *Koon*, the district court's determination that the circumstances are so unusual or extraordinary as to warrant a departure is entitled to deference.

Moreover, the government's argument that this Court should deny the petition on the ground that the Sixth Circuit would reach the same result applying *Koon* flies in the face of the decision of the Court of Appeals to stay the mandate to permit petitioner to file this petition. Petitioner's stay request was based in principal part on his argument that this Court's then-impending decision in *Koon* would have a direct bearing on this case. The Sixth Circuit granted this request over the government's opposition. The Court of Appeals' decision to grant the stay simply cannot be squared with the government's position here that the Sixth Circuit would necessarily reach the same result under *Koon*. *See* 6th Cir. R. 15(a) (standards governing stay petitions).

The government's request that this Court deny certiorari on the ground that the Sixth Circuit would reach the same result under *Koon* also is inappropriate in light of the considerations governing the exercise of this Court's GVR authority set forth in *Lawrence* v. *Chater, supra*. In effect, the government asks this Court to consider this case on the merits—in the absence of briefing and argument—and to conclude that the result would be no different under the vastly different standard of review mandated by *Koon*. As this Court observed last Term in *Chater*, that would be a wasteful allocation of this Court's "scarce resources." 116 S. Ct. at 606. Even in the close case (which this is not), a GVR order is warranted to "procur[e] the benefit of the lower court's insight" as to the import of an intervening event before this Court considers the development itself. *Id.*

d. *Fourth*, the equities cut decisively in favor of remanding this case to the Sixth Circuit so that it may reconsider its decision under the proper standard of review. No less than personal liberty interests are at stake—the additional 18 months' imprisonment to which petitioner would be condemned under the Sixth Circuit decision applying what everyone now recognizes was "the wrong standard of review." Opp. 7. In similar cir-

cumstances, this Court recognized in *Stutson* v. *United States*, 116 S. Ct. 600 (1996) (per curiam), that the considerations favoring the exercise of this Court's GVR authority are heightened in a criminal case in which "a litigant is subject to the continuing coercive power of the Government in the form of imprisonment." *Id.* at 603. In these circumstances, "a GVR order both promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it." *Id.*

3. For the foregoing reasons, each of the considerations identified in *Chater* supports the exercise of this Court's GVR authority here. But that comes as little surprise. This Court already has exercised that authority in circumstances analogous to those presented here. *United States* v. *Rybicki*, 116 S. Ct. 2543 (1996).

The district court in *Rybicki* departed downwards at sentencing in part on the basis of discouraged factors including the defendant's extraordinary family responsibilities and military service. Applying a de novo standard of review, the Fourth Circuit reversed in part based on its view that the defendant's situation was not sufficiently extraordinary to warrant a departure. *See United States* v. *Rybicki*, 60 F.3d 826 (table), 1995 WL 420001, at *6-*7 (4th Cir. 1995). On June 24, 1996, less than 10 days after the *Koon* decision was handed down, this Court issued a GVR order in the *Rybicki* case, which was pending on certiorari, so that the Fourth Circuit could reconsider its decision in light of *Koon*. 116 S. Ct. at 2543.

The case for deference to the district court's departure decision is much stronger in this case than in *Rybicki*. But this Court's GVR order in *Rybicki* provides an additional reason for following the same course here. One of the considerations favoring the exercise of this Court's GVR authority is that the GVR order "alleviates the potential for unequal treatment that is inherent in [the Court's] inability to grant plenary review of all pending

cases raising similar issues." *Lawrence* v. *Chater*, 116 S. Ct. at 606-607 (internal quotation marks and citation omitted). In light of this Court's GVR order in *Rybicki* in circumstances analogous to those presented here, the potential for unequal treatment is especially acute in this case and weighs heavily in favor of the same result as in *Rybicki*.

4. Finally, this Court need not reach the second question presented by this petition in the event it determines that a GVR in light of *Koon* is appropriate. Nevertheless, the government is incorrect in suggesting that this question does not merit plenary review. Opp. 9-11. As explained in the petition, the circuits are split on the question whether, in determining if a defendant's conduct or prior record is sufficiently unusual to warrant a departure under the Sentencing Guidelines, the district court should compare the defendant's case only with cases involving defendants convicted of the same type of offense. *See* Pet. 16-20.[2] That question is important and squarely implicated by this case. *Id.* at 20-21.

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[2] The government suggests that *United States* v. *DeMasi*, 40 F.3d 1306 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 947 (1995), is distinguishable in that community service is supposedly atypical for bank robbers like the defendant in *DeMasi* but typical for those convicted of fraud like petitioner here. Opp. 10. The government offers no support for this stereotypical observation, and, in fact, the Sentencing Guidelines for fraud cover a broad range of crimes committed by all sorts of individuals, including those not prone to community service. Moreover, there is no basis in the First Circuit's opinion in *DeMasi* for adoptng the government's self-serving interpretation of that case. The First Circuit made its position unambiguous in *DeMasi* that, in determining whether to depart based upon a permissible factor, "[a] court should survey those cases where the departure factor is present, *without limiting its inquiry to cases involving the same offense*, and only then ask whether the defendant's record stands out from the crowd." 40 F.3d at 1324 (emphasis added). As explained in the petition, that position conflicts with the rule established by the Eighth Circuit in *United States* v. *Haverstat*, 22 F.3d 790, 795-796 (8th Cir. 1994), *cert. denied*, 116 S. Ct. 671 (1995), and applied by the Sixth Circuit below, *see* Pet.

Contrary to the suggestion of the government (Opp. 9), *Koon* did not resolve that question. Indeed, the question was not raised by either party in *Koon* and was never specifically addressed in the Court's decision. Moreover, the conflict identified in the petition will not, as the government also suggests, go away, since the question of the proper yardstick for determining whether to depart based on the existence of a discouraged factor in some unusual or extraordinary way is intrinsic to virtually every departure decision based upon such a factor, and therefore will continue to confront the courts. In the event this Court declines to issue the requested GVR order, therefore, it should take the opportunity to resolve this conflict here.[3]

17, which substantially narrows the survey to cases involving defendants convicted of the *same type of offense*.

[3] The government suggests that the Sentencing Commission, not this Court, is the proper entity to resolve this fundamental issue of departure analysis. Opp. 11. Neither of the cases it cites, however, supports this argument. In fact, in *Braxton* v. *United States*, 500 U.S. 344 (1991), the Court stated: "A principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law." *Id.* at 347. Moreover, the government's position is belied by this Court's decision in *Koon*, as well as numerous cases before it, in which this Court resolved circuit conflicts, such as the one presented here, concerning the proper application of the Sentencing Guidelines.

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, this Court should grant the petition, vacate the judgment below, and remand for further consideration in light of *Koon*. Alternatively, the Court should grant the petition and decide the other important question presented.

Respectfully submitted,

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